United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

(Deferred Appendix Method Rule 30 (c)
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B/
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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74 - 2547

COLLEGE POINT DRYDOCK AND SUPPLY CO., RED STAR BARGE LINES, INC. and RED STAR TOWING AND TRANSPORTATION COMPANY,

Plaintiffs-Appellants,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant-Appellee.

BRIEF FOR APPELLEE

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STATEMENT

This action was tried before Judge Kevin T. Duffy sitting without a jury. The District Court opinion is not yet reported. It was commenced in the name of appellant

College Point Drydock and Supply Co., Inc., as sole plaintiff. The additional appellants were made parties by stipulation in the pre-trial order and it was further stipulated that the new parties were the owner and operator, respectively, of barge "UBC No. 5". Accordingly, the appellant will be referred to throughout, collectively, as "Red Star". Appellee will be referred to as "National Union".

THE FACTS

Only a few comments are necessary with respect to Red Star's recitation of the facts.

Red Star states in its brief that while the "UBC No. 5" was on drydock in January, 1970, "her bottom was examined and the damage found after the subsequent sinking was not then present". In fact, there has been no express finding as to what damage existed in the bottom of the "UBC No. 5" "after the subsequent sinking". The District Court did find that surveyor Kaminsky was not shown (as Red Star's witness Laba testified he was), and did not see, the large crack to which Red Star attributed the sinking (Opinion, p. 3). It declared itself unable to make a finding as to whether the crack existed at all (Opinion, p. 8). It referred to, and apparently accepted as fact, surveyor Kaminsky's testimony that some 48 holes were found in the bottom of the "UBC No. 5" after the sinking, which the witness

described as caused by wastage of the metal (Opinion, p. 3).

At another point, Red Star states that: -

> "The reasonable cost of repairing the damage to the hull was $73,835.00 (Tr. 9 & 117)."

This is a most serious misstatement and is not supported by the record references given. The first of these is to the following statement by counsel for National Union: -

> "Incidentally we are agreed that if those indeed were the damages, the costs as set forth are fair ones".

It is apparent from the opinion of the District Court, that Red Star utterly failed to prove that "those indeed were the damages". Its prime item of damage was a large crack in the forepeak, allegedly 12 to 18 inches long and 6 inches wide at its widest point (Opinion, page 3). As pointed out above, the District Court was not able to conclude that this crack existed (Opinion, page 8). The District Court, having failed to believe Red Star on this crucial point, can hardly be presumed to have found thatany other of Red Star's damage items were genuine.

Red Star's second record reference (Tr. 117) for the alleged cost of repairs contains no mention whatever of repair costs. It relates to a stipulation made by counsel for National Union concerning, solely, the costs of raising the

"UBC No. 5" and bringing her to a place of repair.

It is essential to bear in mind that, as Red Star correctly states, this policy did not insure the "UBC No. 5" against partial loss, but only against actual or constructive total loss and certain expenses, including "sue and labor charges" (Exh. 1).

THE QUESTION PRESENTED

As formulated by Red Star, the "question presented" calls upon the Court to find National Union liable by reason of its failure to carry the burden of proof, or go forward with evidence, in support of an affirmative defense it never asserted. The question should be:

May the assured under a marine policy against loss by specified perils establish its claim by proving that a sinking occurred, and nothing more?

ARGUMENT

POINT I

THIS ACTION IS IN NO WAY CONCERNED WITH WARRANTIES OF SEAWORTHINESS OR WITH THE INCHMAREE CLAUSE.

Red Star commences its argument by stating the law, as expounded in several decisions, as to the existence and nature of the warranty of seaworthiness, if any, in an American time hull policy (as opposed to a voyage hull policy).

Accordingly, it is important to understand that no defense is or ever was asserted to Red Star's claim on the basis of a warranty of seaworthiness. Warranty defenses are affirmative defenses which must be pleaded and as to which the defendant insurer has the burden of proof. A true warranty defense seeks to have the contract of insurance declared void without regard to causal connection between the breach of warranty and the loss. Nothing sounding even remotely of such a defense was pleaded or urged in this case, from start to finish.

Intertwined with Red Star's discussion of warranties of seaworthiness is repeated reference to decisions concerning "a policy containing an Inchmaree Clause". At no

point does Red Star undertake to state what are the provisions of this clause, or what bearing any of them has upon any issue in this action; but the impression is sought to be conveyed

that it is a recent addition to the hull policy that changes the meaning of the older perils clause.

The Inchmaree (Thames & Mersey Marine Ins. Co. v. Hamilton, Fraser & Co.) (1887) 12 App. Cas. 484 (House of Lords) held that damage done to a donkey engine by a malfunction was not insured against by marine hull policies as then written. The decision gave birth, instanter, to a clause which has been a standard part of hull policies ever since. The courts have been familiar with it for generations. Both the United States and England show reported decisions on the clause as early as 1902 (Cleveland & Buffalo Transit Co. v. Insurance Company of North America, 115 F. 431, Jackson v. Mumford, 8 Com. Cas. 61). A useful history may be found in Ferrante v. Detroit Fire & Marine Ins. Co., 125 F. Supp. 621 (S.D. Cal. 1954).

The Inchmaree Clause undertakes, among other things, to pay for damage to hull or machinery consequent upon a latent defect becoming patent. What the Fifth Circuit remarked upon in The Sea Pak (Tropical Marine Products Inc. v. Birmingham Fire Insurance Co.) 247 F2d 116 (1957) is that no policy containing an Inchmaree Clause can ever be thought to have an (implied) absolute warranty of seaworthiness. A latently defective hull cannot be a seaworthy hull, and the policy cannot simultaneously require absolute sea-

worthiness and insure against the consequences of one kind of unseaworthiness. How this relates to any issue in the present action is unknown to National Union.

Red Star's principal reliance is placed (and rightly so) upon this Court's decision in New York, New Haven & Hartford R. R. Co. v. Gray, 240 F2d 460 (1957). That case concerned an English cargo policy. Such policies do not contain Inchmaree Clauses.

POINT II

RED STAR FAILED TO PROVE AT TRIAL THAT THE UNREPAIRED DAMAGE TO THE "UBC No. 5", WHATEVER IT WAS, WAS SUFFICIENT TO JUSTIFY A CLAIM FOR CONSTRUCTIVE TOTAL LOSS.

The policy in suit provides that there shall be no claim for constructive total loss unless the costs of recovery and repair, if undertaken, would exceed the value of the vessel when repaired, which is to be taken to be the insured value.(Exh. 1). The "UBC No. 5" was insured for $100,000. (Id.). It follows that Red Star cannot maintain a claim for constructive total loss unless it proved, at trial, expenses exceeding that sum. It attempted to do so, and it failed.

Red Star spent $40,493.23 to raise the "UBC No. 5" and bring it to the repair yard of Red Star's parent company.

This is not disputed. Thereafter Red Star caused a survey report to be prepared, listing the damages it claimed the vessel had suffered and stating that the cost to repair such damages amounted to $73,835. (Opinion, p. 4). National Union stipulated (Tr. 9) that if such damages existed, then $73,835. was a fair price to repair them. It did not stipulate that they did exist. Indeed, its whole factual position at trial was that one such alleged damage (the crack in the forepeak) did not exist. Judge Duffy stated (Opinion, p. 8) that Red Star failed to prove the existence of the crack.

When Judge Duffy found the existence of the crack unproved, he was addressing himself to the question of causation. Nevertheless, his finding conclusively struck down Red Star's claim of constructive total loss on an independent ground - quantum of damage.

POINT III

RED STAR DID NOT TENDER ABANDONMENT OF THE "UBC NO. 5" TO NATIONAL UNION. WITHOUT AN ABANDONMENT THERE CAN BE NO CLAIM FOR CONSTRUCTIVE TOTAL LOSS.

In England, the law of marine insurance was partially codified by the Marine Insurance Act, 1906, and that codification included a definition of constructive total loss and further expository material as follows:

> "60. Constructive total loss defined. - (1) Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
>
> "* * *
>
> "61. Effect of constructive total loss. - Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.
>
> "62. Notice of abandonment. - (1) Subject to the provisions of this section, when the assured elects to abandon the subject-matter insured to the insurer he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

"* * *

"(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of the benefit to the insurer if notice were given him."

"* * *"

The latter subsection, according to Arnould On Marine Insurance (15th Edition, 1961), section 1185, has application only if there is no step which the insurer might have taken given notice. Arnould says that another way of stating this is simply that no abandonment is necessary in case of an actual total loss, but: -

> "abandonment must be resorted to and notice thereof must be given if there be anything to abandon."

Arnould himself, in his first edition (1848), said that:

> "A constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment." (Quoted in the 15th Edition at section 1081)

In this country, the principal modern text is Gilmore and Black, The Law of Admiralty (1957). Constructive total loss is dealt with in that work at pages 77 through 79 and on page 80. Among other things, the authors say that (p. 79):

> "Constructive total loss, it will be seen, is distinguished on one side from

> "Constructive total loss, it will be seen, is distinguished on one side from actual total loss, and on the other from partial loss. The principal effect of the first distinction is that no formal abandonment need be made in respect of the actual total loss, while the tender of abandonment, either accepted by the underwriter or binding upon him because of the existent facts, is a prerequisite to a claim under a constructive total loss." (emphasis)

A careful reading of the decisions of courts in this country reveals a single decision that calls into question the above statement by Gilmore and Black.

In Rock Transport Corp. v. Hartford Fire Ins. Co., 312 F. Supp. 341 (S.D.N.Y. 1970)* Judge McMahon held that the assured might recover for constructive total loss of eleven scows without tendering abandonment, when the underwriter had already rejected a claim for partial damage t one of the scows. The insurer's action was said to be "inconsistent with the acceptance of abandonment" and, accordingly, a "waiver" of abandonment, which the court called a "technical act".

The cases cited by the court in support of these statements are Force v. Providence Washington Ins. Co., 35 Fed. 767 (N.D.N.Y. 1888); Roux v. Slavador [1836] 132 English Reprint 413; Rankin v. Potter [1873] 6 L.R.H.L. 83.

*The District Court decision was affirmed in an opinion by retired Supreme Court Justice Clark, 433 F2d 155, which does not discuss abandonment.

The best known of these cases is Roux v. Salvador. It is the leading case on the distinction between actual total loss and constructive total loss and is quoted from at length by both Arnould (section 1047) and Gilmore and Black (section 2-14, page 76). It stands for the proposition that no abandonment is necessary when there is nothing to abandon, that is, in case of actual total loss; but that it is necessary when "there is a possibility, however remote * * * of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it". The quoted language is from Roux v. Salvador and fails, spectacularly, to support Judge McMahon's decision in Rock Transport.

The other two cases are examples of the doctrine expounded in Roux v. Salvador. In each, there was nothing to abandon; the loss was actually total.

In Rankin v. Potter, 6 L.R.H.L 83 (also reported in volume II, New Series, of Aspinall's Reports of Maritime Cases, at page 65) the assured shipowner procured a policy, effective during a voyage from Britain to New Zealand against the loss of homeward freight under a charter already arranged. The ship was abandoned to hull underwriters as a constructive total loss as a result of perils encountered on the outward voyage. The Law Lords were all of the opinion that the homeward freight was thereby totally lost

and that nothing remained to "abandon" in respect of the policy on that interest.

In Force v. Providence Washington Ins. Co., 35 Fed. 767 (N.D.N.Y. 1888) the plaintiffs were holders of a "bottomry bond". That is, they had advanced money to the ship against an instrument making repayment conditional upon the ship reaching its destination, which was "Ilo Ilo and Manila". The bond was payable out of the "first freights" at "final" destination. The ship reached Ilo Ilo and collected some $1900. freight, but was totally lost at sea between Ilo Ilo and Manila.

The plaintiffs had insured their interest as holders of the bottomry bond. The dispute concerned whether the loss was total, the underwriter claiming credit for the $1900. in freight which the vessel had collected, although the holders of the bottomry bond has never gotten any of it.

The underwriter also claimed that as a result of the collection of some freight by the vessel owner the loss was less than total and that the plaintiffs, to claim as for a total loss, should have ceded (abandoned to underwriters) the bottomry bond.

The Court held that the security for a bottomry loan is the ship itself, which was an actual total loss on the high seas.

It also held that as nothing was, by the terms of the bond, to become payable until arrival at Manila, the bond was not diminished by the master's receipt of $1900. at Ilo Ilo. Libellant, "even if present at Ilo Ilo", would not have been entitled to any part of the $1900., so its receipt by the master did not diminish the risk.

It held that no abandonment was necessary when no property remained to be abandoned, but only (if anything, which the court doubted) a cause of action which would pass to underwriters upon payment, by way of subrogation.

The use of the word "technical" by Judge McMahon in Rock Transport Corp. v. Hartford Fire Ins. Co., in connection with the doctrine of constructive total loss and abandonment, is at least historically appropriate. The original term for what we now call constructive total loss was "technical total loss". Bradlie v. Maryland Ins. Co., 12 Peters (37 U.S.) 378; Canada Sugar Ref. Co. v. Ins. Co. of North America, 175 U.S. 609, 621; Peele v. Merchant$' Ins. Co., Fed Cas. 10,905.

Standard Marine Ins. Co. v. Nome Beach L. & T. Co., 133 Fed. 636 (CCA9 1904), certiorari denied 200 U.S. 616, is the only other case we have found in which an attempt was made to collect a total loss where the property was not actually totally lost and no abandonment was tendered. The

Court of Appeals said:

> "* * * the trouble with counsel's point is that, so far as the evidence shows, the assured did not then, nor at any other time when the property was the subject of abandonment, undertake to abandon it."

In The Portmar, 209 F 2d 558 (CA2), page 560, the court said that the right to claim a constructive total loss was dependent upon seasonable abandonment, citing Independent Transportation Co. v. Canton Ins. Office, 173 Fed 564, where there was clearly a right to abandon, but notice was not given until some four months after the facts were known.

It should be noted that, given the existence of a state of facts justifying abandonment, the option to abandon or not to abandon is always in the assured. Thus, in The St. Johns, 101 F. 469 (S.D.N.Y. 1900) the vessel was underinsured and the assured elected to claim the cost of repairs. The underwriter attempted to require abandonment in return for payment of the face amount of the policy, but eventually (without suit) agreed that the assured was within its rights in declining to follow this course. The litigation concerned the rights that flowed by way of subrogation upon payment as for a partial loss.

In Klein v. Globe & Rutgers Fire Ins. Co., 2 F2d 137 (CA3) the assured was permitted to recover as for a

partial loss and its claim to a constructive total loss rejected. The Court of Appeals quoted with approval the entire District Court opinion, including its statement that (p. 141):

> "It is a primary rule that, before the assured can recover for a constructive total loss, he must abandon all his interest in the vessel to the insurer."

National Union maintains that Red Star's ~~plaintiff's~~ failure, ever, to tender abandonment in the present case, takes "constructive total loss" out of the suit.

POINT IV

THE RIGHT TO ABANDON AND CLAIM AS FOR A CONSTRUCTIVE TOTAL LOSS IS DEPENDENT UPON PROSPECTIVE COSTS AT THE TIME OF ABANDONMENT.

As has already been made clear, Red Star failed to prove the quantum of damage suffered by the "UBC No. 5". Under this point heading, National Union seeks to illustrate that even if plaintiff had proved everything it claimed, and had shown a tender of abandonment as well, it could not recover as for a constructive total loss; because only unincurred expenses may be considered.

The doctrine of constructive total loss is a rule of reason. No assured should be compelled to do, to preserve his rights under his policy of insurance, what he would not do if uninsured.

The barge "UBC No. 5" was agreed to be worth $100,000. If it had been determined, before raising the barge, that raising her, bringing her to a place of repair and effecting full repairs would, together, cost $110,000, no prudent uninsured owner would undertake the expense.

If, however, at a cost of about $40,000 the barge was raised and brought to a place of repair, where it was ascertained that complete repair would cost $70,000, no

prudent uninsured owner would abandon the vessel at that point. By a prospective investment of $70,000 he could recover a $100,000 asset. The $40,000 expenditure already made would not enter into his calculations.

Does the law conform to reason? It appears to do so.

Section 60 of the Marine Insurance Act, 1906, from which we have already quoted, at some length, provides in part that:

> "(2) In particular there is a constructive total loss:
>
> "* * *
>
> "(iii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.
>
> "In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired * * *" (emphasis supplied)

Humphreys v. Union Ins. Co., Fed Cas No. 6,871 is a case decided by Mr. Justice Story. It involved a vessel heavily damaged while on a foreign voyage. Itwas, unquestionably, damaged to such a degree as to justify

abandonment and immediately upon receipt of advices from abroad the owner did abandon to underwriters. However, by the time the abandonment was made the vessel had been repaired (at a cost which illustrated that abandonment without repair would have been justified) and proceeded on its voyage. It was held that on the date of the abandonment the vessel was no longer a constructive total loss and the abandonment was not justified.

The irrationality of any other rule is apparent. In a given case expenses to the extent of 90% of the insured value might already have been incurred for recovery and repair, when further damages amounting to only, say, 11% of the agreed value were ascertained. If abandonment were then tendered, who would say that on the date of abandonment the vessel was, in any practical sense a constructive total loss?

In this connection it should be borne in mind that the underwriter's obligation to pay sue and labor charges is a distinct and separate obligation, so that payment of such expenses does not exhaust the policy. It is entirely possible, and happens, that an underwriter pays substantial sue and labor charges plus a total loss in the full agreed amount. It is another matter to argue, as does plaintiff in this case, that it may recover sue and labor charges from defendant and, at the same time, use these sums to make up the quantum of a constructive total loss.

In Hall v. Hayman, ~~Volume XII, N.S., Aspinall's Reports of Maritime Cases (King's Bench Division, 1911)~~ (1911) 12 Asp. Mar. Law Cas. (N.S.) 158, 161, the court faced the problem of calculating whether abandonment was justified. The first expense listed for its consideration was that of an attempt to get the vessel off the strand before notice of abandonment was given. The court said:

> "It is said that I ought to allow that nevertheless. Mr. Bailhache conceded that if that had been done by the shipowner, he could not have claimed that as part of the repairs, because they were not future salvage operations, but he said it had in fact been done by the underwriters, and therefore I ought to include it. I do not see that. In estimating the cost of repairs, I do not think I have anything to do with the underwriters. It is all upon the assumption as to what a prudent uninsured owner would do, and I have got to see whether on the 9th Dec. [the date of abandonment] the cost of repairs, as stated in the Act, including those items mentioned in the Act, would or would not exceed the value when repaired. I cannot take into consideration anything that was done before, which, as a matter of fact, neither improved the situation nor worsened it."

In summary, defendant maintains that, all other points aside, any right to abandon and claim a constructive total loss that might otherwise have existed expired when prospective costs ceased to be in excess of insured value.

POINT V

RED STAR WAS ENTITLED TO RECOVER THE COSTS OF RAISING THE "UBC NO. 5" ONLY IF THESE COSTS WERE REASONABLY INCURRED TO AVERT OR MINIMIZE A LOSS FOR WHICH NATIONAL UNION WOULD HAVE BEEN LIABLE UNDER THE POLICY. RED STAR FAILED TO ESTABLISH THAT THIS WAS THE CASE.

The Marine Insurance Act, 1906, provides (section 78) that: -

> "* * *
>
> "(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause."

That the law is the same in this country has never been doubted. As Gilmore and Black put it (The Law of Admiralty, page 68, footnote): -

> "The underwriters contribute under this clause only where the charges are incurred to avert a loss for which they would be answerable."

Accordingly, a claim under the Sue and Labor Clause requires the same proof that the casualty resulted from a peril insured against as any other claim on the policy. Having failed to prove that the sinking of the "UBC No. 5" was occasioned by a peril of the seas, Red Star cannot recover the cost of raising her.

POINT VI

RED STAR FAILED TO PROVE THAT THE "UBC NO. 5" SANK BY REASON OF A PERIL OF THE SEAS.

The policy of insurance in suit insures "against loss by reason of specified perils and contingencies" (Red Star's Brief). Red Star's principal thesis on the appeal is that one of these "specified perils" is in fact all encompassing, so that any sinking of the vessel not connived at by the assured is covered by the policy. That peril, the only one referred to at trial or here is "perils of the seas".

There have been, surely, well over fifty marine insurance cases in which the courts of England and the United States have been called upon to say whether a particular loss or damage did, or did not result from "perils of the seas". There have been many more decisions construing the same phrase in bills of lading. There are numerous cases in the highest courts saying that the phrase has the identical meaning in the two documents (e.g. The Xantho, (1887) 12 A.C. 503 (House of Lords); The G. R. Booth, 171 U.S. 540, 458). There is one reported decision in which a court apparently says that they have different meanings in the two (Allen N. Spooner & Son, Inc. v. Connecticut Fire Insurance Co., 314 F2d 753 (CA2 1963) at page 757, ftn.).

Oddly enough, the court in Spooner cited, in close association with its distinction of the bill of lading cases, two House of Lord's decisions in bill of lading cases (in one of which the House explained that the phrase originated in the policy and had precisely the same meaning in the bill).

National Union's thesis on this appeal is that: -

> "* * * in considering what is and what is not a peril of the sea the question is whether the loss arose from injury from without or weakness from within "Dwyer v. Prov. Wash. Ins. Co., 1958 A.M.C. 1488 (Georgia Court of Appeals).

Our quotation is chosen not for its authority but for its correct description of what the courts have actually done in the vast majority of reported cases. It is our further thesis that to rely upon short quotations taken from these cases without noting the facts, and the actual disposition, is to be misled. In illustration, we refer to the most recent decision of the Court of Appeals for the Fifth Circuit in which a definition of "perils of the sea" was given in an insurance case. In Reisman v. New Hampshire Fire Ins. Co., 312 F2d 17, that court quoted and applied the definition first formulated by this court in an earlier (non-insurance) case, as follows:

> "Perils of the sea are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise

> from irresistible force or over-whelming power * * *."

We turn from this to a definition given by the Court of Appeals of the State of New York in Cary v. Home Ins. Co. 235 N.Y. 296 (1923), and often quoted, as follows:

> "The phrase 'perils of the sea' as used in a policy of marine insurance is not limited to extraordinary perils. It covers all kinds of marine casualties due to the fortuitous action of the sea, such as sinking or capsizing."

Seemingly these two courts are in total disagreement. In actuality they reached the same conclusion on comparable facts. In Reisman a yacht sank at its mooring, because worms had eaten its bottom out. The court held that this was not a loss by sea perils. In Cary, a scow capsized while moored, because it was leaky and the court (after giving the wide definition just quoted) held that "her own defects, not the perils or dangers of the sea, were the cause of her misfortune". Recovery under the policy was denied.

We turn next to other cases in which recovery has been denied, concentrating on the fact situations that led to such denials.

In The Adequate, 305 F2d 944 (CA9), a yacht sank in its slip. Water had entered through wear and tear holes in the engine exhaust line. Held not to be a loss by perils of the seas under English law and usage.

In Union Marine Ins. Co. v. Charles D. Stone & Co., 15 F2d (CA7) 927, the assured showed only that his cargo had been wetted by sea water. The court held that the assured had failed to carry its burden of proof of loss by a sea peril.

In Larsen v. Ins. Co. of North America, 252 F. Supp. 458 (W.D. Wash.), affirmed 362 F2d 261, the assured showed that his salmon was damaged because a "sea suction" fell off the vessel by reason of "corrosion and electroysis", admitting sea water. The court held that this was not a loss by sea perils.

In E. D. Sassoon & Co. v. Western Assurance Co., 1912 A.C. 561 (Privy Council), plaintiff showed that its insured property was damaged by sea water while stored in a hulk in the Whangpoo River. The sea water had entered through a rotted place in the hulk which was hidden by copper sheathing. Privy Council held that this was not a loss by perils of the seas. Lord Mersey, speaking for a unanimous court said:

> "It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss."

In Continental Ins. Co. v. Patton Tully Transp. Co., 212 F2d 543 (CA5), two barges had sunk. One while in tow,

when it encountered the wave action of a passing tug; the other without explanation, after breaking its moorings. The court held that the assured had failed, in both cases, to show loss by a peril of the river.

In The Yacht Rowdy, 177 F. Supp. 932 (E.D. Mich.), the vessel sank at its winter moorings because the seacock had been left open. This was held not to be a loss by perils of the seas.

In the Bertie Kay, 106 F. Supp. 244 (E.D.N.C.) the vessel sank suddenly in calm water, without explanation. It was held that no showing had been made of loss by perils of the seas.

In Grant, Smith & Co. v. Seattle Construction & Dry Dock Co. [Privy Council] 1920 A.C. 162, a dry dock sank in calm water, apparently as a result of its own condition. This was not a loss by perils of the sea. Such insurance, the court said, "is not a guarantee that a ship will float".

We have already referred to Cary, decided in the New York Court of Appeals. One more of the many state court decisions to the same effect bears note, because the court detected that: -

> "The essence of the concept of perils of the seas is that the cause of the danger is outside the vessel as differentiated from an internal weakness of the vessel" Pacific Dredging Co. v. Hurly, 1965 A.M.C. 836 (State of Washington).

We turn now to cases where recovery was allowed. In Compagnia de Navegacion v. Ins. Co., 277 U.S. 66, a tug designed for inland waters was knowingly insured for a sea voyage. It sank in seas that would not be considered extraordinary for a larger vessel. The Supreme Court held that the term "perils of the sea" was flexible, and that weather which would not constitute a peril to a larger vessel would be a peril to this one. This holding is, of course, utterly incompatible with Red Star's thesis that any unintended sinking is a loss by sea perils.

In Mountain v. Whittle, 1921 A.C. 615 (House of Lords), the fact was that a houseboat was sunk by an unusual breast wave from a tug. This was held to be a loss by sea perils, but the court noted that: -

> "If the water was in a normal condition and get into the houseboat simply owing to the defective character of the seams there would be no loss by perils of the seas - the loss would have been by the defective condition of the vessel. A loss caused by the entrance of seawater is not necessarily a loss by perils of the seas. There must be some special circumstance * * *."

The Xantho, [1887] 12 A.C. 503 (House of Lords) was not an insurance case at all, but is frequently assumed to have been one by courts and lawyers in a hurry. It contains language to the effect that every unintended incursion of sea water is a peril of the seas (in Lord

Bramwell's speech). The facts were that the "Xantho" was in collision, and the other vessel was at fault. The holding was that this fell within the exception of perils of the seas in the bill of lading, and the other Lords confined themselves to this.

Another bill of lading case commonly assumed to be an insurance case is Hamilton, Fraser & Co. v. Pandorf & Co. [1887] 12 A.C. 518. The facts were that cargo was damaged when sea water entered a hold through a hole chewed in a pipe by rats. These facts are often produced triumphantly by those who would demonstrate that literally anything will suffice as a sea peril. But this was not so in the opinion of the Lords who decided that case.

Lord Halsbury said that the bill of lading provisions excusing the vessel owner from liability for damage by perils of the seas -

> "* * * contemplated * * * any accident (not wear and tear or natural decay)"

- that damaged the cargo -

> "by letting the sea into the vessel"

- and Lord Macnaghten noted that if the cargo owner had not abandoned its claim that the pipe was made of an unsuitable material there would have been a jury question.

Red Star cites in its brief the case of McAllister v. Western Assurance Co., 218 App. Div. 564, a New York intermediate appellate decision, and quotes language from that case which appears to support its thesis that all unintentional sinkings are losses by sea perils. It fails to tell us that the facts were that the barge's seams were opened by an accident or to quote to us the nub of the opinion (218 App. Div. at 568) where the court said:

> "* * * what the parties, I think, contemplated was that if any accident (not wear and tear or natural decay) should do damage by letting the sea into the vessel, that should be one of the things contemplated by the contract."

Red Star also cites The Panamanian, (Compania Transatlantica Centroamericana, S.A. v. Alliance Assur. Co.) 50 F. Supp. 986 (SDNY) without stating the facts, which were that a valve unaccountably jammed open admitting sea water into the engine room. In National Union's submission this is a "gray area" case on the facts. On the law the decision is patently wrong in placing the burden on the underwriter to show that the cause of loss was not a sea peril (Northwestern Mutual Life Ins. Co. v. Linard, 498 F2d 556 (CA2 1974)). It is interesting to note however that one of the things that the court held that the underwriter could show, to avoid liability, was that the sinking was through "wear and tear" (50 Supp. at page 990).

Red Star's principal authorities are New York, New Haven & Hartford R. R. Co. v. Gray, 240 F2d 460 (CA2) and Allen N. Spooner & Son v. Connecticut Fire Ins. Co., 314 F2d 753 (CA2). On its facts, the Spooner decision is not at all out of line with those heretofore discussed. A crane barge was engaged in a delicate salvage operation in the East River, under contract with the United States. Coast Guard vessels were stationed above and below the barge to stop all river traffic at critical times (see District Court findings of fact Nos. 21 and 24 and discussion of the latter at 206 F. Supp., page 500). A vessel eluded the Coast Guard and passed the insured vessel at a critical moment, causing it to topple over. The result in Spooner can be justified under National Union's thesis and, indeed, the court did so, distinguishing cases holding that "ordinary" swells are not perils of the sea.

Concededly, however, the language in Spooner goes much further. The court cited and quoted from Gray on the question what constituted a sea peril (the only decision, anywhere, ever, to do so) and, noting that Gray was a decision on English law said that, as the Supreme Court had urged conformity to English law in matters of ocean marine insurance, the law announced in Gray was American law as well. This was a remarkable bootstrap feat, for the law as announced and applied in Gray was

plainly contrary to the decided cases in both countries.

It is in Spooner that the court set forth the thesis that bill of lading cases on the meaning of the terms "perils of the seas" in a policy of marine insurance (314 F2d at page 757, ftn.). It is also in Spooner (314 F2d at page 756) that the court quotes from The Xantho (supra, p. 27) and recites the facts of Hamilton, & Fraser & Co. v. Pandorf (supra, p. 28), both bill of lading cases.

We come finally to New York, New Haven & Hartford R. R. Co. v. Gray, 240 F2d 460 (CA2). We do not distinguish it. It does not fit National Union's analysis of the decided cases. If it was correctly decided, then all other appellate courts that have addressed themselves to the subject, in this country and abroad have been in error.

In Sipowicz v. Wimble, 370 F. Supp. 442 (SDNY 1974), Judge Cannella said that Gray was not so "all encompassing" as claimed and after a scholarly consideration of the decided cases concluded that when a vessel sinks by reason of its own weakness (always saving true latent defect) the sinking is not by one of the perils insured against in a marine hull policy. National Union respectfully suggests that Judge Cannella went as far as a District Judge may and that it would be a service to jurisprudence if this Court would now say that in its

opinion Gray was wrongly decided.

In its most recent decision concerning a policy of insurance like the one at bar, Northwestern Mutual Life Ins. Co. v. Linard, 498 F2d 556 (CA2 1974), this court said:

> "This was not a so-called 'all risks' policy wherein all losses attributable to external causes are covered, absent specific exclusion thereof. * * *
>
> "The burden of proof generally is on the insured to show that the loss occurred from a covered peril. It is, of course, prerequisite to the liability of the underwriter, under either the general perils clause or the special coverage clause [i.e. the Inchmaree Clause], that the loss be 'proximately caused by the peril insured against and claimed under. * * * The loss, moreover, must be fortuitous."

We contrast this with Red Star's counsel's statement at the commencement of trial, below, that (tr. 4):

> "All we can do is speculate about the cause of the crack on the side."

- and Judge Duffy's holding (Opinion, p. 8) that the existence of the crack was also speculative.

CONCLUSION

Red Star failed to prove that the "UBC No. 5" sank by reason of a peril insured against. It failed to prove, at all, the cause of sinking. Red Star failed to prove that the "UBC No. 5" sustained damages sufficient to justify abandonment and a claim for constructive total loss.

Red Star did not at any time tender abandonment of the "UBC No. 5" to underwriters. Such a tender of abandonment is a prerequisite to a claim for constructive total loss.

The decision of the District Court should be affirmed.

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A copy of the within brief received this 6th day of Feb, 1975

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